

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

C. F. LYTLE COMPANY, INC., a corporation,
and GREEN CONSTRUCTION COMPANY, a
Corporation,

Appellee,

vs.

HANSEN & ROWLAND, INC., a corporation,

Appellant.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION

HONORABLE CHARLES H. LEAVY, *Judge*

BRIEF OF APPELLANT

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FILED

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No. 11639

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TOPICAL INDEX

	Page
ARGUMENT	18
ASSIGNMENT AND SPECIFICATIONS OF ERROR RELIED UPON BY APPELLANT_	16
INTEREST	27
RES ADJUDICATA	35
SPECIFICATIONS OF ERROR NO. 2.....	22
SPECIFICATIONS OF ERROR NO. 3.....	27
STATEMENT OF CASE	
PLEADINGS	3
FACTS	3-15

TABLE OF CASES

<i>Barbo v. Norris</i> , 138 Wash. 627, 245 Pac. 414----	33
<i>City of Camas v. Higgins</i> , 120 Wash. 40, 206 Pac. 951	37, 38
<i>Dickinson Fire and Pressed Brick Co. v. Crowe & Co.</i> , 63 Wash. 550, 115 Pac. 1087.....	30, 31
<i>Dornberg v. Black Carbon Coal Company</i> , 93 Wash. 682, 161 Pac. 645.....	30, 33
<i>Epley v. Hunter</i> , 157 Wash. 333, 289 Pac. 27.....	38
<i>Empire State Surety Co. v. Moran Bros. Co.</i> , 71 Wash. 171, 127 Pac. 1104.....	28, 32, 34
<i>Fell v. Union Pac. R. Co.</i> , 32 Utah 101, 88 Pac. 1003, 28 LRA (N.S.) 1 and note; 22 Cyc. 1513	30, 32
<i>Gange Lumber Co. v. Rowley</i> , 22 Wash. 2d, 250, 155 P. (2) 802.....	37
<i>Giacolene v. United States</i> , 13 Fed. 2d, 108.....	22
<i>Glover v. Rochester-German Ins. Co.</i> , 11 Wash. 143 39 Pac. 380	30

<i>Goss v. Northern Pacific Hospital Ass'n</i> , 50 Wash. 236, 96 Pac. 1078-----	23, 26
<i>Hill v. Brandes</i> , 1 Wash. 2d 196, 95 Pac. 2d 382--	33
<i>Hocking v. British American Assurance Co.</i> , 62 Wash. 73, 113 Pac. 259-----	23
<i>Isaacson Iron Works v. Ocean Accident & Guar- antee Corporation</i> , 191 Wash. 221, 70 Pac. 2d 1026 -----	23
<i>Lloyd v. American Can Co.</i> , 128 Wash. 298, 222 Pac. 876 -----	33
<i>Matthews v. Columbia National Bank</i> , 100 Fed. 397 (Ninth Cir.) -----	36
<i>McCurry v. United States</i> , 281 Fed. 532-----	22
<i>McHugh v. Tacoma</i> , 76 Wash. 127, 135 Pac. 1011--	31
<i>Mobile etc. Railway Co. v. Jury</i> , 111 U. S. 584, 28 L. Ed. 527-----	33
<i>Moore v. Sacajawea Lumber & Shingle Co.</i> , 144 Wash. 38, 256 Pac. 331-----	37
<i>Morehouse v. Everett</i> , 141 Wash. 399, 252 Pac. 157, 58 A.L.R. 1482 -----	38
<i>Mountain Timber Co. v. Lumber Insurance Co.</i> 99 Wash. 243, 169 Pac. 591-----	23
<i>New York, Lake Erie and Western Railway Co. v. Estel</i> , 147 U. S. 591-----	33
<i>Pacific Coast Casualty Co. v. Home Tel. & Tel. Co.</i> , 11 Cal. App. 712, 106 Pac. 262-----	30
<i>Parks v. Elmore</i> , 59 Wash. 584, 110 Pac. 381-----	30
<i>Properties Inv. Corp. v. Trefethen</i> , 155 Wash. 493, 284 Pac. 782-----	23
<i>State v. Superior Court of Spokane County</i> , 74 Wash. 556, 134 Pac. 173-----	37
<i>Sullivan v. McMillan</i> , 19 So. 340-----	34

<i>Supervisors v. Kennicott</i> , 94 U.S. 498, 24 L. Ed. 260 -----	36
<i>Thompson v. Maxwell Land Grant Company</i> , 168 U. S. 451-456; 42 L. Ed. 539-----	36, 37
<i>United States v. Skinner and Eddy Corporation</i> , 35 Fed. 2d 889-----	31
<i>Viking Automatic Sprinkling Co. v. Pacific In- demnity Co.</i> , 19 Wash. 2d, 294, 142 Pac. 2d, 394	23
<i>Williams v. United States</i> , 135 Fed. 2d, 81-----	22
<i>Yarne v. Hedlund Box & Lumber Co.</i> , 135 Wash. 406, 237 Pac. 1002-----	34

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BRIEF OF APPELLANT

JURISDICTION

Appellant filed a complaint in the Superior Court of the State of Washington for Pierce County on August 5, 1943 (Tr. 7) in which it sought recovery from defendants of an insurance premium in the amount of \$16,153.73 (Tr. 2-7). It appears from the complaint

that plaintiff is a Washington corporation, a resident and citizen of the State of Washington; that defendants are Iowa corporations, residents and citizens of the State of Iowa. The cause was removed (Tr. 15) to the United States District Court for the Western District of Washington, Southern Division, upon petition for removal (Tr. 9), pursuant to 28 U.S.C., Section 71. The District Court had jurisdiction of the cause by virtue of 28 U.S.C. 41 (Tr. 1). After trial the lower court awarded judgment to plaintiff against defendants in the amount of \$16,153.73, and for costs, which judgment was on appeal reversed by this court (151 Fed. (2d) 573). The cause came on for further hearing pursuant to the opinion and mandate of this court, resulting in the trial court entering final judgment on February 4, 1947 in favor of appellant and against appellees in the amount of \$4,904.10, together with costs of suit in the amount of \$94.00 (Tr. 473-4). On April 23, 1947 and within ninety days following the entry of said judgment, Hansen & Rowland, Inc., Appellant, served and filed its Notice of Appeal from said judgment (Tr. 475-6) (U.S.C.A. Title 28, Section 230). The amount in controversy on this appeal is in excess of \$3,000.00, exclusive of costs (Tr. p. 2) (U.S.C.A. Title 28, Section 231). On the same date appellant filed its cost bond on appeal in the amount of \$1,000.00, conditioned as required by Federal Rules of Civil Procedure (Rules 73, Section 3). Copy of appeal bond executed by Maryland Casualty Company, a corporation, as surety, together with notice of filing of same was served on opposing counsel on April 23, 1947.

STATEMENT OF CASE PLEADINGS

The complaint alleges that Phoenix Indemnity Company, assignor of plaintiff, issued to defendants a certain policy of liability insurance effective June 17, 1942 (Tr. 72) for an agreed premium at the rate of 85c for each \$100.00 of wages paid to employees of appellees and their associated contractors (fifteen in number), in connection with the performance of certain work to be done on the Alaska Highway; that during the period the policy was in force from June 17, 1942 to September 1, 1942, the total wages paid amounted to \$1,055,214.02; that because defendants cancelled the policy, plaintiff became entitled to premium on short-rate basis amounting to \$16,153.73 (Tr. 2-6). Defendants answered denying anything due in excess of the amount of \$8.59 (Second Amended Answer, Tr. 18).

FACTS

The policy was issued indemnifying defendants against legal liability for personal and property damage with respect to work performed on sections described as "A-1 and A-2", being 155 miles of highway in Alaska extending from the Canada border to a town called Slana. Work was also performed on three other sections, Richardson Highway, Section A-3, Section A-4 (Map Tr. p. 278 (Tr. 503-506)). By its decision (151 Fed (2d) 573) this court held in substance that the work done not in connection with Sections A-1 and A-2 did not come within the policy coverage and the

payrolls incident to work not connected with Sections A-1 and A-2 could not be used as a part of the premium base. In this connection this court said:

* * *“and it plainly appears that it was not done in connection with the construction of the latter sections as might have been the case if for example, it had been done so that A-4 might be used for necessary transmission of A-1 and A-2 supplies.”

Defendant's witness, Mr. Polk, resident engineer for the government (Tr. 501) the only witness testifying at the further hearing, testified that all equipment was assembled at Valdez, where it was unloaded from vessels and then taken overland to Gulkana (Tr. 510) and they improved Richardson Highway, over which they had to bring in their equipment and supplies (Tr. 503) which was an existing road connecting Valdez and Gulkana. All of the employees and equipment went to Alaska in connection with the initial construction of Sections A-1 and A-2, the 155-mile section (Tr. 549-550) and after they arrived at Gulkana the workmen with their equipment were then assigned to different sections of work (Tr. 533; Tr. 540; Tr. 544; Tr. 550; Tr. 554; Tr. 562). Shortly after the arrival of outfits in Alaska they were ordered to assist in opening up the trail road, part of the 155-mile area (Tr. 513). Between June and August the trail road (Section A-3) was not readily passable and it was necessary to keep quite a large maintenance crew on that all of the time (Tr. 524). It was a mixture of a lot of men, a few from every organization for a while (Tr. 525, Tr. 544). It

was necessary to improve and maintain Section A-3 in order to reach Sections A-1 and A-2, the 155-mile section (Tr. 557). The construction of the main camp was started on July 7, and at the same time they started work on Section A-3 by using hand tools (Tr. 506-507) as well as working on Richardson Highway (Tr. 509). No evidence was offered as to the amount of pay roll on Richardson Highway necessary for the movement of men and equipment.

The trial court made the following Findings of Fact:

“III.

That between the 17th day of June, 1942, and the 31st day of August, 1942, workmen and employees of Defendants and the various unit contractors named in the insurance policy, Exhibit 4 herein, on which premiums are claimed, performed work and labor on a section of the highway known as Section A-3, between Gulkana and Slana, Alaska, for the purpose of, and necessary to enable workmen and equipment to reach said sections A-1 and A-2, and necessary for the transmission of supplies to said sections A-1 and A-2 of said highway, and without (2) which work and labor said sections could not be reached. That with the remuneration earned by employees of plaintiff and of said unit contractors in the performance of said work was and is the sum of \$27,594.00.” (Finding III Tr. 470)

The trial court summarized its duty in the following language:

“The Court: What I tried to say this forenoon and perhaps I did not say it as clearly as I should, under this decision of the Circuit Court I feel that

I (70) am impelled to find that the insurance rates should be calculated upon all employees, or their wage that they received in working on the two sections—that's 1 and 2, during the period here involved, and in addition thereto, there should be included, insofar as it can be ascertained, the time these same employees, or employees of these same contractors put into unloading the equipment and supplies that were to be used on this contract, plus the time that they put into maintaining the highway on Section 3, so that it was available for the movement of this heavy equipment, plus any travel time within that period covered by the contract.”
(Tr. 545)

In the course of its opinion this court said:

* * *“An issue appears to be presented as to whether some part of that section of the payroll representing wages of workers traveling to Alaska prior to assignment comes within the premium base. The cause will be remanded for the taking of such evidence on this or other issues as may be necessary for the entry of a judgment for premiums due in conformity with the views herein expresse^d as to the policy's coverage limitation.”
(Op. p. 577)

During the course of the hearing the following occurred (Tr. 533):

“Mr. Peterson: Do I understand that when these contractors came up there on the job, then they were assigned to some particular section?

The Witness: Yes, sir.

Mr. Peterson: Yes, and that was after arrival there?

The Witness: Yes, although some of these outfits didn't get in until very late.

The Court: I understand, but after they arrived there then you assigned them to a job? (56)

The Witness: Yes.

Cross-Examination

By Mr. Peterson:

Q. Mr. Polk, do I understand that after the contractors got up there, we will say the Western Construction Company (75) after they arrived there then you assigned them to some other section, is that the way it was done?

A. Yes, that's it.

Q. Now, this computation, I understand that is being offered here this uncertified computation, covers the transportation or the travel time probably more correctly, of the employees going up there with respect to Sections 1 and 2, that's correct, is it not, under the primary contract?

A. Yes, I think that is true.

Q. And after they arrived there then they were diverted to these other sections, Richardson Highway and 3 and 4?

A. Yes.

Q. That's the way it happened?

A. That's the way it happened. * * *
(Tr. 549-550).

Q. Mr. Polk, have you made a checkup and given a careful consideration to the matter of the time consumed and the remuneration earned with respect to unloading equipment at Valdez and moving it into the job? A. Yes, I Have.

Q. Yes. Is it possible to determine that accurately?

A. No, sir, it is not.

Q. And it can only be arrived at, can it, by an estimate, considering all of the factors?

A. Well, in my opinion it can be.

Q. Yes, and what in your opinion is a proper amount on (83) account of payroll to be allowed for the unloading of the equipment at Valdez and moving it in to Gulkana?

A. Well, the way I arrived at that was this way: I figured that it would take ten per cent of the contractor's crew a period of fifteen days.

Q. And that, considering the rate of pay, what did that amount to in dollars?

Roughly, it is around five thousand dollars for both contractors.

Q. But for the entire equipment, was how much?

Q. For the entire equipment of all contractors moving in? A. \$40,000.

Q. \$40,000, and then for the maintenance of the road in—from Gulkana to Salana, for necessities or supplies to be moved in what did you estimate that entire—how many men did you estimate was required in that maintenance job?

A. I estimated 35 men for the period July 7 to August 31.

Q. That is 54 days, I think. A. Yes.

Q. And your entire computation of that was?

A. \$27,954.

Q. Then I understand you deducted \$5,000 from that figure on account of employees of Weldon Brothers and (84) Dusenbergs, for the reason that their entire personnel was embodied in the payroll which had been presented?

A. That is right.

Q. That is right, so that a summary of your figures then is, making allowances for these deductions for Dusenbergs, because their men and Weldon Brothers being included in the payroll which has been presented, your estimate is \$35,000, with respect to the unloading?

A. Yes, sir.

Q. And moving in, and \$22,000 - \$22,594, with respect to the maintenance incident to Sections 1 and 2 of the so-called—of the road along Section 3?

A. Yes, that's right.

The Court: Well, I must confess that I am still confused, particularly on the \$40,000 item. You said \$40,000 for all contractors. Now do you mean by that—

The Witness: I estimate \$40,000 was the entire cost of unloading all equipment and transporting all equipment.

The Court: Well, was that equipment that was going to be used on Sections 1 and 2, if it hadn't been for the diversion?

A. Yes, sir. (85)

The Court: Well, that clears it up. You refer to all contractors and you have these other two sections of the road that is confusing the Court. In this \$5,000 item that you deducted from the forty thousand, is that because it is an included item in the payrolls?

The Witness: Yes, otherwise we would be allowing that payroll twice.

The Court: I see.

Mr. Peterson: And that is true with respect to the maintenance.

The Court: Well, the sum and substance of your testimony is, then, that the sum of \$25,000 plus

\$22,594 would represent the amount that would be chargeable as against this insurance premium, or insurance policy.

The Witness: Yes, sir, except the Dusenbergs and Weldon's share of unloading and maintaining has been excluded from those figures.

The Court: Well, that's the \$5,000 that has been excluded in the two items?

The Witness: Yes.

The Court: Well, then, it would follow that the judgment would be one based upon the amount of the travel time, plus the amount of the unloading and maintenance, plus the month's work during the month of August, (86).

Mr. Sager: That is my understanding now, your Honor, but I will have to supplement the record with the travel time of Dusenbergs and Weldon Brothers. I don't think that is included in that summary."

(Tr. 556-559).

In this connection the court made Finding of Fact No. 5 as follows:

V.

That the remuneration earned by the employees of Defendants and the employees of the unit contractors named in said policy of insurance between the effective date of said policy of insurance, June 17th, 1942, and the effective date of cancellation thereof, Sept. 1st, 1942, was and is as follows: Travel time of employees and work in unloading and moving equipment directly connected with the performance of the contract on Sections A-1 and A-2 of said Alaska Highway, \$202,882.68, which remuneration was earned by said employees prior to their assignments to other sections or areas; remuneration earned by employees of De-

fendants and said unit price contractors named in said policy of insurance between June 17, 1942 and August 31, 1942, necessary for the movement of equipment, employees and transmission of supplies to Sections A-1 and A-2 of said highway, \$27,594.00; remuneration paid by Weldon Bros. and E. M. Dusenbergl, Inc., to laborers employed directly on Sections A-1 and A-2 during the month of August, 1942, \$90,053.81—total, \$320,530.49. That based on the premium rate on account of earned payroll, or remuneration of the employees of Defendants and associate unit contractors in the performance of said work and activities, the earned premium computed in accordance with the customary short-rate table and (3) procedure was and is \$4,904.10.
(Tr. 470-471)

This court in its opinion allowed the payroll items of Weldon Bros. and Dusenbergl Co. Inc., in the amount of \$90,053.81 to stand as a proper charge on which premium was to be computed.

With respect to the matter of burden of proof, the following took place:

Mr. Peterson: Your Honor, under the policy of insurance it is made the duty of the insured to report the payrolls in connection with this matter for the purpose of the premium base and that's part of the contract on which we have sued here, and of course, under our contract we are entitled to have that done. They did, as your Honor remembers, furnish us with the payrolls and the Circuit Court of Appeals held they were not to be considered, but now for the purpose of arriving at what we are entitled to I think we should have some effort at least of the defendants here, under their contract, to comply with their contract in that respect.

The Court: That's the reason if the parties are advised of what the Court's position in the matter of law is going to be you ought to be able to work that out, and its very clear that this case can only be finally disposed of on the matter of dollars and cents, by some fair, reasonable and logical compromise, because there is no possibility of definitely ascertaining what the wages were of each of these various men who no one knows how, hardly where they could be found or who they are, and -----

Mr. Sager: If your Honor please, we have the payrolls and I have a summary which I have submitted to (50) counsel -----

The Court: Sure, but the payrolls have become so jumbled, insofar as the law has been announced here by the Circuit Court. If you pin yourself down to just work done on these two sections in this period of about sixty-five or seventy days, that would be a very simple matter, but unfortunately the Court has seen fit to inject another element into this case. This Court tried the case upon the basis of the payrolls submitted in accordance with the insurance contract. The Circuit Court now calls for a different determination, and it might be a question as to where the burden rests, but it seems to me that if you do not approach this with some spirit of compromise it is very evident to this Court now that more than the payroll of two contractors, who stood around there or sat around there, or what they did, on Sections one and two, for a period of sixty or seventy-five days, is involved in this case. It's more than that amount. (Tr. 527-528)

The court finally ruled that the burden of proof was on plaintiff to establish the amount of remuneration. The following occurred:

The Court: It should, but I can readily see the

difficulty that would be encountered if you try to determine that exactly, and the burden of course would be on the plaintiff to establish that as a fact, because the plaintiff alleges this amount of insurance premium due and under the holding of the Circuit Court I have no alternative but to charge the plaintiff with that, and the testimony of the witness offered on behalf of the defendant clearly indicates that there is some fair sized sum of money due there, but if I apply strict rules of proof, why it would be a case of denying relief where the Court felt that some relief was probably forthcoming.
(Tr. 554-555)

Mr. Polk testified there was no way of determining actual and accurate payrolls of the men unloading equipment, (Tr. 540) and the witness arrived at the payroll or remuneration paid, labor for unloading equipment and maintenance of Section A-3 and transmission of supplies and equipment to Sections A-1 and A-2 (155-mile limit) by estimates. (Tr. 542, Tr. 550, Tr. 556, Tr. 557, Tr. 558).

The insurance contract involved contains, among others, the following provisions:

"The name insured shall maintain for each hazard records of the information necessary for premium computation on the basis stated in the declarations, and shall send copies of such records to the company at the end of the policy period and at such times during the policy period as the company may direct." (Tr. 1 pp. 73-74)

"It is hereby understood and agreed that this policy is issued upon a Monthly pay-roll basis and that immediately after the expiration of each period of One month from date of policy the Assured

shall render a written statement to the Company of the full amount of remuneration paid employees during such period and shall immediately pay the premium thereon based upon the rates stated in the policy. The deposit premium paid on delivery of the policy shall apply on the final payment of premium.

“Nothing herein contained shall be held to vary, waive, alter or extend any of the terms, conditions, agreements or declarations of the undermentioned policy, other than as above stated.” (Tr. p. 77)

* * * * *

“If, in the case of any other contractor or sub-contractor covered as an additional named insured under said Policy, the remuneration of such contractor's or sub-contractor's employees is not available to the Company, the earned premium as respects such contractor or sub-contractor shall be computed by using a remuneration 50% of the entire contract or sub-contract cost paid to such contractor or sub-contractor.” (Tr. p. 83)

The travel time of employees of Horrabin Construction Company, et al, other than Weldon Bros. and Dusenberg Co., Inc. was \$137,932.90 (Exhibit A-15, Tr. p. 539). The travel time of employees of Weldon Bros. & Dusenberg Co., Inc. was \$24,949.88, (Exhibit A-16, Tr. pp. 551, 562, 566). The total remuneration paid by assured to workmen on the Alaska project from June 17, 1942 to August 31, 1942, inclusive, was \$1,055,214.02 (Tr. 161 and 449). The trial court found that \$320,530.49 of the total amount was on account of remuneration on which premiums were payable, in accordance with the formula laid down by this court. (Tr. 470-471). In arriving at this amount the trial

court took into consideration an estimate of Mr. Polk, appellee's witness, that \$40,000 was a proper amount of payroll for handling, unloading and moving equipment into the job before the workmen were assigned to sections other than A-1 and A-2, and also took into consideration an estimate by the same witness that \$27,594.00 was a proper amount of payroll to be allowed for the necessary opening up and maintaining of Section A-3 of the road for the purpose of moving and transmitting equipment and supplies to Sections A-1 and A-2 (the 155-mile section) of said road. Appellant concedes that the items travel time of Horrabin Construction Co., et al, employees \$137,932.90, and travel time of employees of Weldon Bros. and Dusen-berg Co., Inc. \$24,949.88, and labor performed by same parties between August 1st and August 31st of \$90,-053.81 of employees working on Sections A-1 and A-2, making a total of \$252,936.59, are proper items, on which to base premium computation, but contend that under the contract between the parties there should also be included as a base for premium computation 50% of the balance of the total payroll, that is, 50% of \$1,055,214.02, less the conceded items of \$252,-936.59, or the sum of \$401,138.71, since members of all of the crews of the different sub or unit contractors worked at different times at handling, unloading and moving equipment and at opening up and maintaining the section of highway A-3 for the purpose of moving and transporting equipment and supplies to Sections A-1 and A-2, (Tr P544) and that the trial court had

no right to substitute estimates of an interested witness for actual figures, nor to disregard the fact that work was necessarily done and payroll incurred on Richardson Highway for the purpose of moving men and equipment from Valdez to Gulkana before any diversion occurred.

Other questions will be referred to and discussed on the following pages.

ASSIGNMENT AND SPECIFICATIONS OF ERRORS RELIED ON BY APPELLANT

1. The Trial Court committed reversible error in ruling that the burden was on plaintiff to establish the amount of remuneration paid employees by defendants, on which premiums were to be computed, the effect of which ruling impaired the contract between the parties which provides:

“The named insured shall maintain for each hazard records of the information necessary for premium computation on the basis stated in the declarations, and shall send copies of such records to the company at the end of the policy period and at such times during the policy period as the company may direct.”

* * * * *

“The deposit premium stated in the policy to which this endorsement is attached is not based upon the estimated remuneration for the policy period but is the sum hereby agreed to be paid in cash on delivery of the policy.

“It is hereby understood and agreed that this policy is issued upon a Monthly pay-roll basis and

that immediately after the expiration of each period of One Month from date of policy the Assured shall render a written statement to the Company of the full amount of remuneration paid employees during such period and shall immediately pay the premium thereon based upon the rates stated in the policy. The deposit premium paid on delivery of the policy shall apply on the final payment of premium.

“Nothing herein contained shall be held to vary, waive, alter or extend any of the terms, conditions, agreements or declarations of the undermentioned policy, other than as above stated.” (Tr. 1. 73, 74 & 77)

2. Upon Defendants showing that they had not maintained for each hazard, records of the information necessary for premium computation, and that it was impossible for them to state or compute the remuneration paid to employees of unit contractors with respect to handling, unloading and moving equipment, and opening and maintaining section of highway A-3, the Trial Court was bound to have computed the earned premium by using as remuneration 50% of the unit contract cost of each sub-contractor as shown by the payrolls, Exhibit 16, as required by the provisions of the insurance contract, to-wit:

“If, in the case of any other contractor or sub-contractor covered as an additional named insured under said Policy, the remuneration is such contractor’s or sub-contractor’s employees is not respects such contractor or sub-contractor shall be computed by using as remuneration 50% of the entire contract or sub-contract cost paid to such contractor or sub-contractor.” (Tr. p. 83) (Tr. p. 577)

3. Notwithstanding the legal basis for the computation of premium may have been the subject of controversy between the parties, the amounts to which appellant is entitled came due under the contract on September 1, 1942, and was capable of exact determination by computation and bears interest from that date. (Tr. p. 567)

4. Appellant (Plaintiff) is entitled to interest at the legal rate from September 1, 1942, on any recovery allowed, in accordance with the original judgment entered herein on September 22, 1944 (Trans. P. 31), which is *res adjudicata* on the question of interest. (That part of the judgment not being reversed by this Court). (Tr. p. 567)

ARGUMENT

Specification of Error No. 1 is directed to the error of the court in ruling as a matter of law that the burden was on appellant to establish the amount of remuneration paid employees by defendants on which premiums were to be computed. At the threshold of the case the following occurred:

“THE COURT: What I tried to say this forenoon and perhaps I did not say it as clearly as I should, under this decision of the Circuit Court I feel that I am impelled to find that the insurance rates should be calculated upon all employees, or their wages that they received in working on the two sections—that’s 1 and 2, during the period here involved, and in addition thereto, there should be included, insofar as it can be ascertained, the time these same employees, or employees of these

same contractors put into unloading the equipment and supplies that were to be used on this contract, plus the time that they put into maintaining the highway on Section 3, so that it was available for the movement of this heavy equipment, plus any travel time within that period covered by the contract." (Tr. p. 545)

* * * * *

"MR. PETERSON: 'Your Honor, under the policy of insurance it is made the duty of the insured to report the payrolls in connection with this matter for the purpose of the premium base and that's part of the contract on which we have sued here, and of course, under our contract we are entitled to have that done. They did, as Your Honor remembers, furnish us with the payrolls and the Circuit Court of Appeals held they were not to be considered, but now for the purpose of arriving at what we are entitled to I think we should have some effort at least of the defendants here, under their contract, to comply with their contract in that respect.'" (Tr. p. 527)

* * * * *

"MR. SAGER: I think by my offering these other two summaries of the travel time paid Dusenbergh and Weldon Brothers, and Mr. Polk can estimate there what additional cost there would be on the unloading and transportation and maintenance because of the inclusion of those two contractors, it would fairly well give us the figures.

"THE COURT: It should, but I can readily see the difficulty that would be encountered if you try to determine that exactly, and the burden of course would be on the plaintiff to establish that as a fact, because the plaintiff alleges this amount of insurance premium due and under the holding

of the Circuit Court I have no alternative but to charge the plaintiff with that, and the testimony of the witness offered on behalf of the defendant clearly indicates that there is some fair sized sum of money due there, but if I apply strict rules of proof, why it would be a case of denying relief where the Court felt that some relief was probably forthcoming.

“MR. PETERSON: Well, now, do I understand that the ruling of the Court is that weher men were recruited and proceeded to Gulkana; after arriving there they were diverted to some other than the 155-mile section; that the plaintiff is entitled to the travel time and the time until such diversion took place?

“THE COURT: Yes, insofar as—the burden is upon you to establish some amount.” (Tr. 554-5)

The appellant had the right to stand on its contract. That defendants recognized that the duty devolved upon them to furnish the information is evidenced by the fact that they did so. (See plaintiff's Exhibit 6, Tr. pp. 92-4; Exhibit 7, Tr. p. 99; Plaintiff's Exhibit 8, Tr. pp. 101-3; Plaintiff's Exhibit 9, Tr. pp. 104-5; Plaintiff's Exhibit 17, Tr. pp. 429 to 433, inc.)

The fact that this court disagreed with the lower court with respect to the working areas with respect to which payrolls applied, in nowise changed or effected tthe rights of the parties under the contract. It was still the duty of defendants to provide the payroll information under the terms of the insurance contract, and even had no contract been in existence the situation and circumstances surrounding the parties imposed that burden on the defendants. They had originally

submitted payroll statements showing that remuneration paid subject to premium payment was \$1,055,-215.02. The figures are embodied in exhibits above referred to and in addition thereto Exhibit No. 10 (Tr. 1, p. 158), which defendants claim was a mistake (Second Amended Answer, Tr. 1, p. 18).

The pleadings were not recast for the further hearing; consequently it proceeded on the original pleadings insofar as the same were applicable under the decision of this court. Plaintiff proved the amount of remuneration paid during the entire policy period. This, under the pleadings and on the record and under the contract between the parties, required defendants to repel what had been proven with excuse or explanation, and to show clearly and distinctly the portion of remuneration paid on work performed which did not come within the policy coverage. A balancing of convenience or of the opportunities for knowledge based upon a common sense estimate of fairness or of facilities to know the facts and to make proof, placed the burden on the defendants independent of contract, since it would not subject the defendants to hardship or oppression, but on the other hand, if the burden were imposed on plaintiff, it would be subjected to the most severe hardship and oppression because of the fact that defendants in charge of the work, kept the time of the employees, issued the pay checks or requisition for the pay checks, made up and certified the payrolls, which at all times were and presumably still are in the possession of or under the control of the defendants.

Cases recognizing these principles are legion. (See *Williams v. United States*, 135 Fed. 2d 81 and cases cited).

This court recognized the principle in *Giacolene v. United States* (in which the writer of this brief was of counsel), 13 Fed. 2d 108, and again in *McCurry v. United States*, 281 Fed. 532.

SPECIFICATION OF ERROR NO. 2

“Upon Defendants showing that they had not maintained for each hazard, records of the information necessary for premium computation, and that it was impossible for them to state or compute the remuneration paid to employees of unit contractors with respect to certain work subject to premium charge, the Trial Court was bound to have computed the earned premium by using as remuneration 50% of the unit contract cost of each subcontractor as shown by the payrolls, Exhibit 16, as required by the provision of the insurance contract, to-wit:

“ ‘If, in the case of any other contractor or sub-contractor covered as an additional named insured under said Policy, the remuneration of such contractor’s or sub-contractor’s employees is not available to the Company, the earned premium as respects such contractors or sub-contractor shall be computed by using as remuneration 50% of the entire contract or sub-contract cost paid to such contractor or sub-contractor.’ ” (Tr. p. 577)

That an insurance company, like any other litigant, is entitled to have its contract reasonably interpreted in accord with the apparent object and intention of the parts, is so elementary and fundamentally

sound that the citation of authorities appears unnecessary. If, however, it is considered necessary to cite cases in support of so simple a proposition, the following may be consulted: *Hocking v. British American Assurance Co.* 62 Wash. 73, 113 Pac. 259; *Mountain Timber Co. v. Lumber Insurance Co.*, 99 Wash. 243, 169 Pac. 591; *Isaacson Iron Works v. Ocean Accident & Guarantee Corporation*, 191 Wash. 221, 70 Pac. 2d 1026; *Viking Automatic Sprinkling Co. v. Pacific Indemnity Co.*, 19 Wash. 2d 294, 142 Pac. 2d 394.

In *Income Properties Inv. Corp. v. Trefethen*. 155 Wash. 493, 284 Pac. 782, the Supreme Court of the State of Washington said:

* * * "When parties deliberately enter into a contract which is valid in all respects, we have, with almost unvarying uniformity, followed the principle that the provisions of such contracts should be enforced. See *Goss v. Northern Pacific Hospital Ass'n.*, 50 Wash. 236, 96 Pac. 1078; *Heaton v. Smith*, 134 Wash. 540, 235 Pac. 958. To the same effect is the decision of the United States Supreme Court in the *Henderson* case, *infra*."

The late Justice Fullerton of the Supreme Court of Washington in the cited case, *Goss v. Northern Pacific Hospital Ass'n.*, 50 Wash. 236, 96 Pac. 1078, made observations strikingly pertinent here. The court said:

"The trial judge ruled as he did on the principal question because of the clause in the contract above quoted. He held that since the parties had contracted that for any delay caused the appellant by the 'act, neglect, delay or default . . . of any other

contractor,' additional time should be given him for the completion of the work, that this marked the extent of appellant's remedy for such act or default.

"It seems to us that this conclusion is sound. For conditions which arise in the execution of a contract and for which the contract itself makes no provision, the courts are at liberty to apply the ordinary legal remedies when these conditions become a subject of controversy between the contractors, but where the probability of the happening of the condition has been foreseen and a remedy is provided for its happening, the presumption is that the parties intended the prescribed remedy as the sole remedy for the condition, and this presumption is controlling where there is nothing in the contract itself or in the conditions surrounding its execution that necessitates a different conclusion. So in this case since the parties foresaw that the appellant might be delayed in the execution of his part of the work by the failure of the party having the contract for the plumbing and heating plant to perform its work on time, and provided in the contract that the remedy therefor should be an extension of time on his part to perform the work, the presumption arises that this was intended to measure the rights of the contractor thereunder. Is there anything in the contract itself or in the circumstances surrounding it, that precludes the idea that it was so intended? We see nothing that works against the conclusiveness of the presumption. The contract was an ordinary building contract, in which the parties undertook to put in writing all of their rights and liabilities thereunder. It provided for every condition that could arising in its execution, leaving nothing to surmise or inference, and we think it must be held to contain the entire agreement."

Paraphrasing the language of the court in the Goss case, the parties here foresaw that appellees might fail to maintain records necessary for correct premium computation and fail to render correct statements thereof to insurer, and might fail to make available to insurer the correct amount of remuneration paid by other contractors subject to premium charge, and expressly provided in the contract in plain, simple language that the remedy for such a failure should be a computation based on 50% of the entire contract or sub-contract. ~~If~~[§] there anything to be found in the contract itself or in circumstances surrounding it that precluded the idea that it was so intended? We see nothing that works against the conclusiveness of the presumption. The contract was an ordinary insurance contract in which the parties undertook to put in writing a statement of all of their rights and liabilities thereunder regarding premiums. It provided for the very condition which arose, leaving nothing to surmise or inference. There is no mistake as to the full amount of remuneration paid in connection with the job. We are asked to disregard the written contract and to accept defendant's estimates and guess-work,—the very contingency which was foreseen and provided against. It appears to us that the court has no alternative, under the circumstances shown here, but is duty bound to give effect to the contract of the parties.

It appears perfectly clear that the provision of the contract quoted was the result of past experience

in writing insurance of this type. If there be any purpose in parties reducing their contracts to writing, and any virtue in such contracts after they are reduced to writing, appellant is entitled to the benefit of this provision. The probability of the happening of such a condition had been foreseen and a remedy provided for its happening. It is made clear by the provision of the contract, that if the proper payroll and remuneration information and statements were not furnished on which to compute premiums, that then 50% of the entire contract price should be taken as the amount for premium base. Mr. Polk may be a man of probity; he is at best an interested witness, and it may be that his estimates of \$40,000 and \$27,594.00, are reasonably accurate. These circumstances, however, do not afford any reason for a court remaking the contract of the parties which is plain and unambiguous, and substituting something else in place of that which the parties themselves agreed to. *Income Properties Inv. Corp. vs. Trefethen, supra.*

We submit that the total remuneration on which premiums should be computed is properly arrived at as follows: Total travel time, \$162,882.68; remuneration paid by E. N. Dusenbergl, Inc., and Weldon Bros., \$90,053.81; total \$252,936.49, which amount, deducted from 1,055,214.02, leaves a balance of \$802,277.53, 50% of which would be \$401,138.76, to which amount should be added \$252,936.49, making a total of \$654,075.25, on which the premium arrived at on the short-rate basis should be computed. The result would be \$10,193.20 due as of September 2, 1942.

INTEREST

Specification of Error No. 3 as follows:

“Notwithstanding the legal basis for the computation of premium may have been the subject of controversy between the parties, the amounts to which appellant is entitled came due under the contract on September 1, 1942, and was capable of exact determination by computation and bears interest from that date.” (Tr. p. 577)

presents the question of right to interest without regard to the question of *res adjudicata* raised in Specification of Error No. 4. The trial court by its judgment denied the recovery of interest from September 1, 1942, the date of the cancellation of the policy (See Judgment, Tr. p. 473). It will be noted that the contract by its terms fixes the price of the insurance at 85c per \$100.00 on all remuneration paid employees. (Tr. p. 84) Obviously, the amount of premium could be arrived at by multiplying the amount of remuneration paid according to defendant's records by the rate. The contract provided that the defendants would maintain proper records and provide correct statements necessary for premium computation, (Tr. p. 74) and would make premium payments immediately after the expiration of each month from date of policy, rendering with the payment a written statement of the amount of remuneration paid employees. (Tr. p. 77)

We, therefore, have a situation where the agreed price of the insurance times the amount of the applicable payrolls would indicate the amount due, the time of payment of which was fixed at the end of each

monthly period. The question of reasonable value was not involved. If there arose in the case a question as to whether or not the payroll from a certain area was subject to premium payment, that circumstance alone did not bring the account within the category of an unliquidated demand for the purpose of computing interest. An identical question arose in the case of *Empire State Surety Co. vs. Moran Bros. Co.*, 71 Wash. 171, 127 Pac. 1104. The facts in that case, as shown by the opinion, parallel the facts in this case. As appears from the statement by the court, the Surety company brought action to recover a balance claimed to be due as premiums upon three insurance policies issued by it to defendant Moran Bros. Co., indemnifying the latter against loss from liability imposed upon it by law for damages, etc.

We quote from the opinion :

“Appellant, at the times here involved, was engaged in repairing and constructing ships and other water craft, and maintained a large plant for that purpose at Seattle. In connection with and as a part of its plant, it maintained a saw-mill, planing mill, lumber yard, machine shop, pattern shop, foundry, boiler shop, pipe shop, and a general light and power plant which furnished light and power for the whole plant. All of these were maintained in comparatively close proximity to each other, though they were separated either by walls or by being in different buildings. They were all mutually dependent upon each other, and were operated to one common end, that is, the building and repairing of ships and water craft. The policies here involved are numbered 3165, 3166 and 3167, respectively. All of them became

effective on May 4, 1905, and all of them expired on May 4, 1906. The amount of premium to be paid in consideration of the indemnity furnished by these policies was by their terms based upon the entire amount of the compensation paid by appellant to its employees, whose injuries or death appellant was indemnified against during the life of the policies. Hence, the amount of premium earned could not be finally determined until the expiration of the term. Because of this, the sums paid upon the premium at the time of the issuance of the policies were by their terms regarded only as tentative estimates of the amounts of the premium earned. It is to recover a balance claimed to be due upon premium so earned that this action was commenced and prosecuted."

Portions of the policies were set forth in the opinion which show that the premiums were based on payroll compensation at different rates to employees working in different departments, consisting of saw mill, planing mill and lumber yard, which carried one rate, drivers and drivers' helpers carrying a different rate, boiler makers, shipbuilders, blacksmith shop, etc., carrying a still different rate, machine and pattern shop carrying another rate, and so on. It was contended by the defendant in that case, that certain employees in certain departments were not covered by the policies, and that the remuneration paid them should not be taken into account in determining premiums earned, which exactly parallels the situation here. (Instead of having saw mills, shipyards, pattern shops, etc., in the instant case we have different numbered sections of highway.) The case contains an excellent exposition of the law on the subject which might have been profit-

ably cited and considered at the original hearing in this case. However, that is water over the dam and we no longer mourn over it.

On the question of interest, the following is persuasive, and we submit decisive of this case. The court said:

“In rendering judgment the trial court allowed interest at the legal rate from the 4th of May, 1906, that being the date of the expiration of the policies and therefore the date upon which the balance of the premium became due. It is contended that this was erroneous because respondent was suing upon an unliquidated demand, and that therefore interest was not allowable to the actual entry of the judgment. This is not a suit for damages based upon tort, nor do we think it is an accounting; but it is a suit to recover an amount due upon a specific contract for the payment of money and the amount due was determined by computation. It is true that the legal basis of the computation was a subject of controversy between the parties, but we think that is immaterial. *Glover v. Rochester-German Ins. Co.*, 11 Wash. 143, 39 Pac. 380; *Parks v. Elmore*, 59 Wash. 584, 110 Pac. 381; *Dickinson Fire & Pressed Brick Co. v. Crowe & Co.* 63 Wash. 550, 115 Pac. 1087; *Fell v. Union Pac. R. Co.*, 32 Utah 101, 88 Pac. 1003, 28 L. R. A. (N.S.) 1, and note; 22 Cyc. 1513. That a suit to recover a claim of this nature is a suit to recover a specific sum due upon contract, and hence not an accounting, is held in *Pacific Coast Casualty Co. v. Home Tel. & Tel. Co.*, 11 Cal. App. 712, 106 Pac. 262. We are of the opinion that the trial court was not in error in allowing interest.” (Op. 179)

In *Dornberg vs. Black Carbon Coal Company*, 93

Wash. 682, 161 Pac. 645, in the course of its opinion, the court said:

“Whatever may be the rule in other states, it is now well settled in this state that interest is allowable upon an unliquidated claim when the amount thereof, can be ascertained by mere computation, and that the claim should be treated as liquidated from the time when its certainty is so determinable.” Citing a number of Washington cases.

This court in *United States vs. Skinner and Eddy Corporation*, 35 Fed. 2nd 889, had occasion to consider the question. In the course of its opinion (Op. 903), after recognizing that the law of the State of Washington applied to interest, held that interest would be computed from the date of accrual of the obligation to pay. Citing several Washington cases, among others, *Dickinson Fire & Pressed Brick Co. v. Crowe and Co.*, 63 Wash. 550, 115 Pac. 1087. In that case as was shown by the facts, the brick company sold a quantity of building brick at an agreed price. In due time in using the brick it was discovered that a quantity thereof was defective. The Crowe Company refused to pay. The brick company brought action and recovered for a portion of the brick delivered. The court held that as to the amount recovered it should bear interest from the date of the delivery of the brick.

In *McHugh vs. Tacoma*, 76 Wash. 127, 135 Pac. 1011, the Supreme Court had under consideration a case where a contractor agreed to place certain water pipe. The city under the terms of the contract changed

the route substantially, and a controversy arose as to whether or not the change of route was extra work. There was also involved the question of a new classifications for loose rock, whether the material was a hardpan, etc., the unit prices of which were fixed by the contract, the question of quantities only being involved. After determining the controversial questions as to quantities, the court allowed interest from the date of the completion of the contract.

It will be observed that the Supreme Court of the State of Washington, in *Empire St. Surety Company vs. Moran Brothers Co.*, cites the case of *Fell vs. Union Pacific Railroad*, 32 Utah 101, 88 Pacific 1003, an action for damages to a shipment of livestock, plaintiff recovered and the controversy arose as to whether or not the demand bore interest from the time of the damage to the livestock, or from the date of the final judgment. The following from the case is instructive:

“The true test to be applied as to whether interest should be allowed before judgment in a given case or not is, therefore, not whether the damages are unliquidated or otherwise, but whether the injury and consequent damages are complete and must be ascertained as of a particular time and in accordance with fixed rules of evidence and known standards of value, which the court or jury must follow in fixing the amount, rather than be guided by their best judgment in assessing the amount to be allowed for past as well as for future injury, or for elements that cannot be measured by any fixed standards of value. The same rule under the same conditions would of necessity apply to actions for breach of contract”.

The Supreme Court of the United States followed the rule laid down in the Fell case in *Mobile etc. Railway Co. vs. Jury*, 111 U. S. 584, 28 L. Ed. 527, and in *New York, Lake Erie and Western Railway Co. vs. Estel*, 147, U. S. 591.

In *Lloyd vs. American Can Co.*, 128 Wash. 298, 222 Pac. 876 the Supreme Court, in a well-considered case, cited the Fell case. In that case the court said:

“A good many cases hold that if there be a reasonably certain standard measurement by the correct application of which one could ascertain the amount he owed, interest should run on an unliquidated claim.”

In *Hill v. Brandes*, 1 Wash. 2d 196, 95 Pac. 2d 382, the court said:

“We held in *Dornberg vs. Black Carbon Coal Co.*, 93 Wash. 682, 161 Pac. 845, that interest is allowable upon an unliquidated claim when the amount thereof can be ascertained by mere computation, and that the claim should be treated as liquidated from the time that its certainty is so determinable.”

In *Barbo vs. Norris*, 138 Wash. 627 245 Pac. 414, the court had occasion to again consider the question of interest in an action to recover the value of labor performed by a subcontractor in connection with work on a railroad right-of-way. The contract was on a unit price basis. The time of payment was fixed. The controversy was as to quantities and credits given. When these questions were determined the amounts due could be determined by computation, and the court

allowed interest from the time the several accounts accrued.

In *Yarne vs. Hedlund Box & Lumber Co.*, 135 Wash. 406, 237, Pac. 1002, the Supreme Court of the State of Washington again had occasion to consider a situation quite similar to the one here. As shown by the facts a judgment of the lower court was modified on appeal. The matter then went back to the lower court to enter a judgment for a reduced amount in accordance with the opinion. It appears that the question of interest was not raised on the first appeal, and the court held that the second judgment would relate to the time when the findings were originally filed and allowed interest in accordance with the findings.

The following from the case of *Sullivan vs. McMillan*, 19 So. 340, is highly persuasive and, we think, states a most wholesome rule:

“Whenever it is ascertained that at a particular time money ought to have been paid, whether in satisfaction of a debt or as a compensation for a breach of duty, or for a failure to keep a contract, interest attaches as an incident.”

In view of the parallel case of *Empire State Surety Company vs. Moran & Co.*, supra, which cannot be distinguished, it appears that nothing further need be said on this subject.

RES ADJUDICATA

Appellant's Specification of Error No. 4, as follows:

“Appellant (Plaintiff) is entitled to interest at the legal rate from September 1, 1942, on any recovery allowed, in accordance with the original judgment entered herein on September 22, 1944 (Tr. P. 31), which is *res adjudicata* on the question of interest. (That part of the judgment not being reversed by this Court).” (Tr. p. 578)

raises the question of the effect of a prior judgment of the lower court affirmed by this court.

The judgment of the lower court from which the first appeal was taken, among other things, provides:

“ORDERED, ADJUDGED and DECREED that Hansen & Rowland, Inc., a corporation, plaintiff herein, do have and recover of and from C. F. Lytle Company, Inc., a corporation, of the State of Iowa, and Green Construction Company, a corporation, of the State of Iowa, and each of them, the principal sum of \$16,153.73, together with interest thereon at the rate of six per cent per annum from September 1, 1942; together with costs in the sum of \$94.00.

“Dated September 22, 1944.” (Tr. p. 31)

It was found and determined by the trial court, which fact is not disputed, that the insurance policy in question was cancelled by defendants effective September 1, 1942. (Tr. p. 29)

By its judgment the trial court determined and adjudged that as of September 1, 1942 a certain amount became due and owing appellant from appellees and awarded a recovery therefor, with interest from September 1, 1942 (Tr. 30), which judgment on appeal was not *reversed* by this court, but the cause was *remanded* with directions to eliminate a part only

of the original recovery. The balance of the recovery, with interest, was not affected. Neither the trial court nor this court has the power at this time to disturb that part of the judgment. *Thompson vs. Maxwell Land Grant Company*, 168 U. S. 451-456; 42 Law Ed. 539. See particularly, quotation with approval by this court (Morrow J.) from Judge Field's Opinion in *Matthews vs. Columbia National Bank*, 100 Fed. 397 (Ninth Cir.). It has become the law of the case and it necessarily follows therefrom that the adjudication that appellant is entitled to premium on the payrolls (\$90,053.81) of Weldon Bros. and Dusenbergl Co. Inc., the amount of which was arrived at by computation, together with interest thereon from the agreed due date, September 1, 1942, is conclusive. There is nothing different or distinct with respect to other payrolls on the same job made a base for premium computation by the Trial Court in its findings and judgment on further hearing, which by the same token is governed by the law of the case, fixed, established and determined with respect to the payrolls of Weldon Bros. & Dusenbergl Co., Inc. In this respect the question is not affected only by the rule of *stare decisis* permitting a court under certain circumstances to overrule a former decision on the law, but the action here is between the same parties, and the former decision makes the law of the case and is in this respect *res adjudicata*. *Supervisors v. Kennicott*, 94 U. S. 498; 24 L. Ed. 260; *Matthews v. Columbia National Bank*, 100 Fed. 393.

In *Thompson v. Maxwell Land Grant Co.*, supra, Mr. Justice Brewer speaking for the court said:

“It is the settled law of this court, as of others, that whatever has been decided on one appeal or writ of error cannot be reexamined on a second appeal or writ of error brought in the same suit. The first decision has become the settled law of the case.”

We respectfully contend that this portion of the judgment of the lower court, which was not made an issue on the first appeal and which was affirmed by this court by decision in sustaining the right to the recovery of a premium on part of the claim, with interest from September 1, 1942, is the law of the case. While the question of interest was not discussed, it appears clear that this court had the interest item in mind since it was referred to in the first paragraph of its opinion. *State vs. Superior Court of Spokane County*, 74 Wash. 556, 134 Pac. 173; *City of Camas v. Higgins*, 120 Wash. 40, 206 Pac. 951; *Moore v. Sacajawea Lumber & Shingle Co.*, 144 Wash. 38, 256 Pac. 331, in which case the court said:

“That determination became conclusive of those matters and thereafter the court was without right to attempt to readjudicate in the same case things not at all different or distinct, but the same as those theretofore adjudged and determined.”

In the case of *Gange Lumber Co. vs. Rowley*, 22 Wash. 2d 250, 155 Pac. 2d 802, decided by the Supreme Court of this state (an *en banc* decision January 22, 1945, the Court said:

“As hereinbefore set out and shown by the record, both of the above questions of law were before this court in ‘Lane v. Department of Labor Industries, supra,’ and specifically decided therein contrary to the contention of the Gange Lumber Company as there made, and contrary to its contentions on this appeal. As this appeal involves the same parties, the same subject matter, and the same questions of law as were involved in the Lane case, supra, the decision in that case on the legal questions here raised, became the law of this case, and therefore when this cause came before the Superior Court it was bound by the law of the case as decided on the former appeal, and as no issue of fact was involved, but only the same issues of law as on the former appeal, the trial court had no alternative other than to dismiss this action. (Camas v. Higgins, 120 Wash. 40, 206 Pac. 951; Morehouse v. Everett, 141 Wash. 399, 252 Pac. 157, 58 A.L.R. 1482; Epley v. Hunter, 157 Wash. 333, 289 Pac. 27.)

In the case last cited, we quoted from 2 R. C. L. p. 223, as follows:

“A Court of review is precluded from agitating questions which were propounded, considered, and decided on a previous review; the decisions agree that, as a general rule, when an appellate court passes upon a question and remands the cause for further proceedings, the question there settled becomes the ‘law of the case’ upon a subsequent appeal; the only mode for reviewing the decision on the prior appeal being by a motion for a rehearing.”

No question of fact having been raised on this appeal, the only issues of law raised herein having been decided adversely to appellant's contention on the former appeal, it follows that the trial court correctly dismissed this action, as the trial court was bound by the law of the case as established by this court on the former appeal.

For the reasons herein assigned, the judgment of the trial court is affirmed.

BEALS, C. J., STEINERT, BLAKE, ROBINSON, MALLERY, and GRADY, J. J., concur.

MILLARD, J. (concurring)—I concur solely on the ground that our opinion or decision in 'Lane v. Department of Labor & Industries, supra,' is the law of the case at bar. I am still of the view that this court grossly erred in its opinion in the Lane case. The constitutional question appellant seeks to raise may be presented in another case in which a different party than in Lane case brings the question here.

SIMPSON, J., concurs with MILLARD, J."

This appears to be the last expression of opinion on the subject by our Supreme Court, and under the law governing practice in the Federal Courts, the decisions of the state court are binding on the Federal Court. It will be noted that three of the judges were of the opinion that the first decision was unsound, but inasmuch as it became the law of the case they concurred with the majority of the Court.

For the foregoing reasons we respectfully submit that the judgment of the lower court should be re-

versed and the lower court should be directed to enter judgment in behalf of appellant and against defendants in the amount of \$10,193.20, together with interest at the legal rate from September 1, 1942.

Respectfully submitted,

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